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Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JERRY L. BURKE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

=====

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When an alleged agreement is set out entirely in documents and the acceptance thereof uncontroverted, is the existence of a binding contract to be determined by the court as a matter of law?

2. Was it prejudicial error to submit the question of whether a contract of sale existed to the jury instead of declaring to the jury that a contract of sale existed as a matter of law?



TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
POINTS OF LAW	7
THE CHARGE	8
THE EVIDENCE	9
CONCLUSION	16
APPENDIX A: Opinion of Ninth Circuit	App. A
APPENDIX B: Order Denying Rehearing	App. B

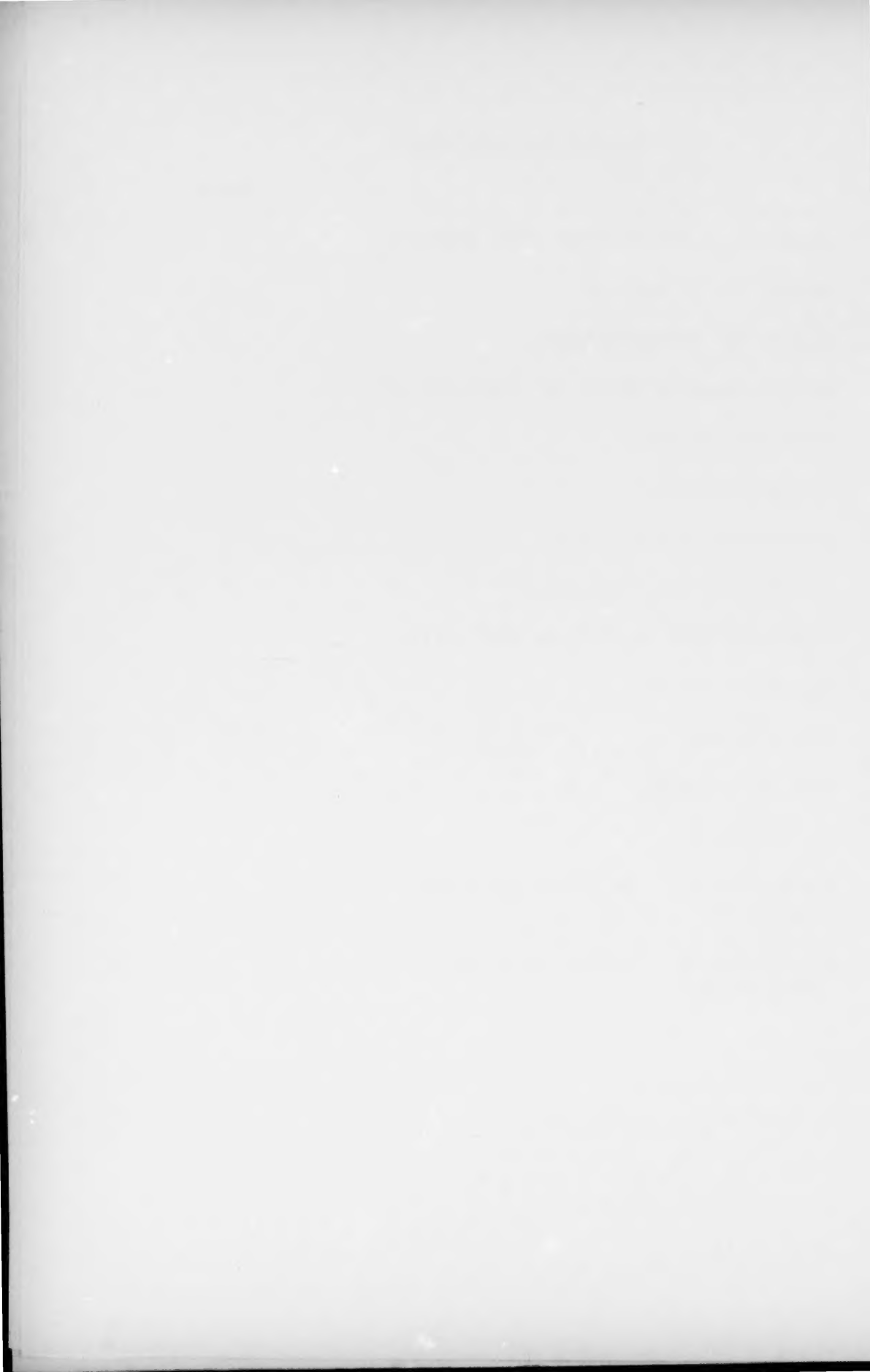


TABLE OF AUTHORITIES

Page

CASES

<u>Bartlam v. Tikka, et.al.,</u> 50 Or App 217, 622 P2d 1133 (1981).....	15
<u>Brown v. Brune,</u> 98 Or App 633, 780 P2d 763. (1989).....	13, 14
<u>Davis v. Dunigan,</u> 186 Or 147, 205 P2d 839 (1949).....	14
<u>Deerfield Commodities, Ltd., v.</u> <u>Nerco, Inc.,</u> 72 Or App 305, 696 P2d 1096 (1985) rev. den. 299 Or 314, 702 P2d 1111 (1985).....	13
<u>Dodge v. Root,</u> 83 Or 21, 162 P 254 (1917).....	12
<u>Erickson Hardwood Co., v.</u> <u>North Pacific Lumber,</u> 70 Or App 557, 690 P2d 1071 (1984) rev. den. 298 Or 705, 695 P2d 1371 (1984).....	13
<u>Hearst Corporation v. Cuneo</u> <u>Press, Inc.,</u> 291 F.2d 714 (7th Cir., 1961).....	11
<u>Higgins v. Bonnett,</u> 282 Or 725, 580 P2d 180 (1978).....	12
<u>Hoffman v. Employer's Liability</u> <u>Corp.,</u> 146 Or 66, 29 P2d 557 (1934)..<	14
<u>Howard v. Thomas,</u> 270 Or 6, 526 P2d 552 (1974).....	13
<u>Jones v. Marshall-Wells Co,</u> 104 Or 388, 208 P 768 (1922).....	12
<u>Kane v. League of Oregon Cities,</u> 66 Or App 836, 676 P2d 901 (1984)....	12



<u>Martin v. United States</u> , 649 F2d 701 (9th Cir. 1981).....	14
<u>Northwestern Agencies v. Flynn</u> , 138 Or 101, 5 P2d 530 (1931).....	12
<u>Oakridge Cablevision v. First Interstate Bank of Oregon</u> , 65 Or App 640, 673 P2d 532 (1983).....	13
<u>Port of Portland v. Water Quality Insurance Syndicate</u> , 796 F2d 1177, (9th Cir., 1986).....	14
<u>Ross Bros. Construction Co., Inc., v. Transportation Commission Highway Division</u> , 59 Or App 374, 650 P2d 1080 (1982).....	13,15
<u>Shaw Wholesale Co. v. Hackbarth</u> , 102 Or 80, 198 P 908, 201 P 1066 (1921).....	12
<u>The Oregon Bank v. Nautilus Crane & Equipment Corporation</u> , 68 Or App 131, 683 P2d 95 (1984).....	13
<u>Timberline Equipment v. St. Paul Fire and Marine Insurance Company</u> , 281 Or 639, 576 P2d 1244 (1978).....	12,15
<u>Toothman v. Concel, Inc., et. al.</u> , 66 Or App 169, 673 P2d 562 (1983)....	13
<u>Wagner v. Rainier Mfg. Co.</u> , 230 Or 531, 371 P2d 274 (1962).....	11,12

STATUTORY PROVISIONS

18 U.S.C. § 1001.....	1,2
28 U.S.C. § 1254(1).....	2
28 U.S.C. § 1291.....	3



IN THE SUPREME COURT OF THE UNITED STATES

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JERRY L. BURKE,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE NINTH CIRCUIT

Petitioner, Jerry L. Burke, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 8, 1991.

OPINION BELOW

The Court of Appeals entered its opinion affirming the conviction of petitioner for making a false statement to an agency of the United States in violation of 18 U.S.C. § 1001. The conviction was affirmed

on May 8, 1991. The Ninth Circuit denied the petition for rehearing filed on May 22, 1991, by order dated July 25, 1991.

JURISDICTION

On September 1, 1989, a jury found petitioner guilty of 18 U.S.C. § 1001, making a false statement to an agency of the United States. On November 6, 1989, the District Court for the District of Oregon denied petitioner's renewal of his motion for judgment of acquittal and/or a new trial under FRCP 29.

On May 8, 1991, the Court of Appeals for the Ninth Circuit issued an opinion affirming the conviction. (App. A). A petition for rehearing with a request for rehearing en banc was filed on May 22, 1991. The petition for rehearing was denied on July 25, 1991. (App. B) The jurisdiction of this court is invoked under Title 28, United States Code § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 United States Code § 1001 provides:

"Whoever, in any matter within the jurisdiction of any de-



partment or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

The statutory basis for Ninth Circuit jurisdiction was 28 United States Code § 1291.

The material facts giving rise to Mr. Burke's conviction are straightforward and uncontroverted:

(1) In the years 1979 to late August, 1983, Mr. Burke was the president of a small bank in Springfield, Oregon, the Emerald Empire Bank;

(2) The financial condition of the bank was precarious because of low core deposits;



(3) A large loan program was arranged with a local building contractor and developer, a Mr. Harsh;

(4) Large amounts were provided as loans on houses constructed by Mr. Harsh;

(5) In late 1982, the Federal Reserve Bank (Fed) conducted an examination of the bank and subsequently in February of 1983, issued a report critical of the large number and amounts of loans to Harsh;

(6) Such loans had been offered for sale to other financial institutions (the secondary market) and by letter of August 3, 1983, Island Savings and Loan, of Oak Harbor, Washington, offered to purchase such loans pursuant to several enumerated conditions. The terms for acceptance of said offer were also explicitly set out.
[trial exhibit 203]

(7) Emerald Empire Bank met all the terms of acceptance including forwarding the loans, as well as a commitment fee check in the amount of \$13,300.00. [trial exhibit 204], Rt 1497. This sum was non-



refundable. A duly accepted copy of the letter of offer also was returned to Island Savings and Loan as required by the terms of the offer.

(8) Mr. Burke then responded to the report of the Fed stating in part that such loans "have been sold into the secondary market";

(9) Some months subsequent, Island Savings took the position that the loans failed to meet the conditions set out and rejected the loans. This rejection occurred after Mr. Burke was no longer with the bank. Rt 1493.

(10) The government charged that Mr. Burke's statement was false on the basis there never was a sale of such loans. Rt 1558-1561.

(11) All of the foregoing was documentary and uncontradicted testimony and, at the conclusion of the government's case, the defense contended that no falsity existed because a contract of sale was created as a matter of law. Rt 1514.



(12) The trial court, however, submitted the issue to the jury;

(13) The Ninth Circuit Court of Appeals also treated the issue as a jury question:

" Burke asserts at the time of his letter to the Fed, a loan purchase agreement between Emerald and Island was complete. We believe a rational jury could have found otherwise. [emphasis added] Opinion, (App A, page 8-9)

REASONS FOR GRANTING THE WRIT

The petitioner, Mr. Burke, was wrongfully convicted. That fact alone may not be controlling. But, from that occurrence arises a glaring need to declare and delineate for trial courts the necessity of making a determination of a legal issue, e.g. the existence of a contract, so lay jurors are not free to pick and choose whether to accept as a fact that which has been created and exists as a matter of law.

The instant case demonstrates ambiguity, and confusion in the criminal arena that probably would not have existed had the case at issue been a suit for specific



performance of the alleged agreement between Emerald Empire Bank and Island Savings and Loan. But the true and ultimate issue is precisely the same; did the offer and acceptance form a binding contract?

Individual liberty should be accorded at least the same protection of the law as is provided to the determination of property rights.

POINTS OF LAW

The validity of Petitioner's conviction hinges on a point of civil law of the State of Oregon. If a contract of sale was formed between Emerald Empire Bank of Springfield, Oregon and Island Savings and Loan of Oak Harbor, Washington, as a matter of law, Mr. Burke has been wrongfully convicted.

Such a legally binding contract of sale was, in fact, so formed. Consequently, the conviction of Mr. Burke was in error.

The facts and circumstance giving rise to this rather bazaar result involve the



nature of the charge, the uncontradicted and uncontroverted documentary and oral testimony and the posture of the case submitted to the jury.

THE CHARGE

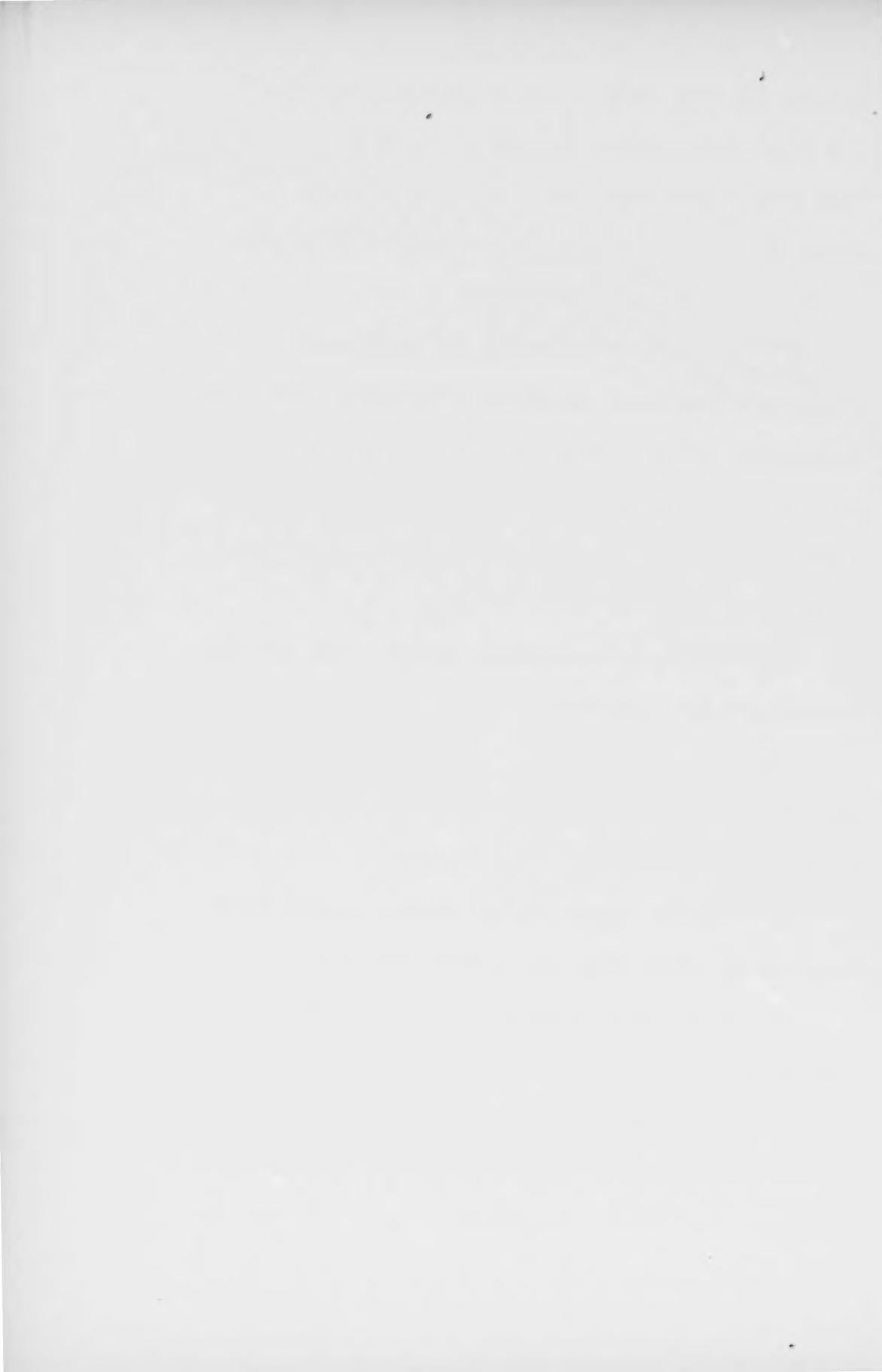
Mr. Burke was accused in fourteen counts of various banking offenses. He was acquitted of all but one charging him with making a false statement to the Federal Reserve Bank. Three false statements were alleged:

(1) "doing a progress inspection on the construction loans";

(2) "all but two of the loans listed on the violation have closed into permanent take-out loans";

(3) "the majority of these loans have been sold into the secondary market".

At trial the submission of the false statement to the jury regarding the sale of loans was opposed on the specific grounds that a contract of sale had been formed as a matter of law. Rt 1514.



The court, nevertheless, submitted all three statements to the jury. The jury returned a general verdict of guilty to that count. Such verdict could, therefore, have been based solely upon the statement regarding the sale of loans. This is particularly likely since the government argued vigorously for such a finding. Rt 1558-1562. Consequently, the submission was clearly prejudicial.

THE EVIDENCE

All of the evidence concerning the issue presented is contained in documentary exhibits or is uncontradicted and uncontested.

By letter of August 3, 1983, Island Savings and Loan offered to purchase the bank loans of Emerald Empire Bank subject to certain enumerated conditions.

Such offer was accepted by paying the non-refundable sum of \$13,000, providing a letter of acceptance, and forwarding the loans being sold to the purchaser. All



events occurred within the time allowed for acceptance. Rt 1488-1489, 1497

The petitioner, as president of Emerald Empire Bank, then filed a response to an examination report of the Fed. Therein he reported that such loans "...have been sold...."

Boiled down to the most essential ingredients the posture of the case was thus: (1) the offer and acceptance constituted a completed contract of sale; (2) as the subject matter of such contract of sale the loans were "sold" both in common parlance and by any reasonable legal definition; (3) consequently, there was no issue of falsity for the jury to determine.

The appellate court below, however, viewed the issue as one to be determined by the jury. The opinion rendered therein states:

"Burke asserts at the time of his letter to the Fed, a loan purchase agreement between Emerald and Island was complete. We believe a rational jury could have found otherwise. [emphasis added]
Opinion, (App A, page 9)

The appellate court below apparently misconstrued the true issue by adopting as controlling the general doctrine regarding the test for upholding a verdict; i.e. whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Opinion, (App A, page 7)

Such an application of the general doctrine to the issue at bar is inapposite. The existence of a binding contract of sale was a question of law to be determined by the court, not a question of fact for the jury. Cf. Hearst Corporation v. Cuneo Press, Inc., 291 F.2d 714, 717 (7th Cir., 1961).

The contract was formed in Oregon and the contract law of the State of Oregon should control. The government conceded as much and has relied upon Oregon contract law. [Government's Brief, page 18]

Oregon law is direct and unequivocal:

"...where the evidence of the alleged contract is all contained in letters or other writings, it is the province of the court to



construe them and see if they constitute a contract." Wagner v. Rainier Mfg. Co, 230 Or 531, 537, 371 P2d 274 (1962).

The Wagner case relies upon a long line of Oregon cases. Northwestern Agencies v. Flynn, 138 Or 101, 106, 5 P2d 530; Jones v. Marshall-Wells Co, 104 Or 388, 396, 208 P 768; Shaw Wholesale Co. v. Hackbarth, 102 Or 80, 93-94, 198 P 908, 201 P 1066; Dodge v. Root, 83 Or 21, 24, 162 P 254.

Wagner has not been overruled and was subsequently cited in: Higgins v. Bonnett, 282 Or 725, 580 P2d 180 (1978) and Kane v. League of Oregon Cities, 66 Or App 836, 676 P2d 901 (1984).

Under Oregon contract law the existence of a contract of sale was clearly a determination for the court.

The rules for such a determination are equally clearly delineated in Oregon law.

"Construction of a contract is a question of law." Timberline Equipment v. St. Paul Fire and Marine Insurance Company, 281 Or 639, 643, 576 P2d 1244 (1978).



See also: Deerfield Commodities, Ltd., v. Nerco, Inc., 72 Or App 305, 696 P2d 1096 (1985) rev. den. 299 Or 314, 702 P2d 1111 (1985); Erickson Hardwood, Co., v. North Pacific Lumber Co., 70 Or App 557, 690 P2d 1071 (1984) rev. den. 298 Or 705, 695 P2d 1371 (1984); The Oregon Bank v. Nautilus Crane & Equipment Corporation, 68 Or App 131, 683 P2d 95 (1984); Toothman v. Concel, Inc., et. al., 66 Or App 169, 673 P2d 562 (1983); Oakridge Cablevision v. First Interstate Bank of Oregon, 65 Or App 640, 673 P2d 532 (1983); Ross Bros. Construction Co., Inc., v. Transportation Commission Highway Division, 59 Or App 374, 376, 650 P2d 1080 (1982).

Courts generally disfavor destruction of contracts because of uncertainty, and will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained. Howard v. Thomas, 270 Or 6, 10, 526 P2d 552 (1974). See Also: Brown



v. Brune, 98 Or App 633, 780 P2d 763
(1989).

The federal appellate court of this circuit has also recognized the role of the court in evaluating contracts as a matter of law. (Cf: Port of Portland v. Water Quality Insurance Syndicate, 796 F2d 1177, 1192 (9th Cir. 1986); Martin v. United States, 649 F2d 701, 703 (9th Cir. 1981))

Under Oregon law, the existence of conditions to be met do not prevent the formation of a contract. On the contrary, the existence of a condition presupposes the existence of a contract. As the Oregon Appellate Court noted in Davis v. Dunigan, 186 Or 147, 153-154, 205 P2d 839 (1949):

"A condition may qualify the liability of one party to the contract or of both parties. The fact that no liability on either side can arise until the happening of a condition does not, however, make the validity of the contract depend upon its happening." Hoffman v. Employer's Liability Corp. 146 Or 66, 73, 29 P2d 557 and quoted with approval in Davis v. Dunigan, supra.



The Oregon rule is that the court first determines the existence of the contract. Then the court determines whether there are ambiguities in the contract. Only ambiguities in the terms of the contract are questions for the jury. Ross Bros. Construction Co., Inc., v. Transportation Commission Highway Division, supra, 59 Or App 374, Timberline Equipment v. St. Paul Fire and Marine Insurance Company, supra, 281 Or 639, Bartlam v. Tikka, et. al., 50 Or App 217, 622 P2d 1133 (1981).

In summary, the Oregon law of contract should be applied. The existence of a contract is favored. This determination is made by the court. If there are ambiguities or conditions, the resolution or performance of such may be determined by a jury; but the contract exists nevertheless.

In the present case, the court should have determined the existence of a contract at the date the charged statement was made. Though executory in nature and needing a number of conditions to be fulfilled, it

was a binding agreement, and not subject to repudiation by either party until or unless the performance of a condition failed. Any such failure occurred much later in time from the date of the charged statement. Rt 1493.

If a binding contract of sale existed, at the date of the statement, no matter how stringent its terms, then the loans that comprised the subject matter of such contract were "sold" regardless of whether some failure of condition later invalidated such agreement.

CONCLUSION

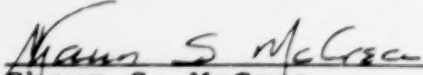
Emerald Empire Bank and Island Savings and Loan had formed a contract of sale of loans as a matter of law. Allowing the jury to decide whether a contract of sale had occurred and to base a verdict of guilty thereon was prejudicial error. The writ should be allowed, the judgment reviewed and the case remanded for new trial with instructions to treat that portion of the statement regarding the



"sale of loans" as established as a matter
of law.

Dated this 23rd day of October, 1991.

Respectfully submitted,


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Of Attorneys for Petitioner,
Jerry L. Burke



SEP 23 1991
MANDATE
ISSUED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-30001
CT/AG#: CR-88-60002-BU

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JERRY L. BURKE

Defendant-Appellant

FILED
91 SEP 26
CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
EUGENE, OREGON
BY

APPEAL FROM the United States District
Court for the District of Oregon (Eugene).

THIS CAUSE came on to be heard on the
Transcript of the Record from the United
States District Court for the District of
Oregon (Eugene) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now
here ordered and adjudged by this Court,
that the judgment of the said District
Court in this cause be, and hereby is
AFFIRMED

Filed and entered May 8, 1991.

APPENDIX "A"



FILED
MAY 8 1991

NOT FOR PUBLICATION US COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	No. 90-30001
)	
Plaintiff-Appellee,)	D.C. No.
)	CR 88-60002-BU
v.)	
)	MEMORANDUM*
JERRY L. BURKE,)	
)	
Defendant-Appellant.)	

Appeal from the United States
District Court
for the District of Oregon
James M. Burns, District Judge, Presiding

Submitted May 6, 1991**
Portland, Oregon

BEFORE: PREGERSON, BRUNETTI, and T.G.
NELSON, Circuit Judges

Jerry L. Burke was convicted in a jury trial of making a false statement to an agency of the United States, pursuant to 17 U.S.C. § 1001. The District Court for the

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Circuit Rule 36-3.

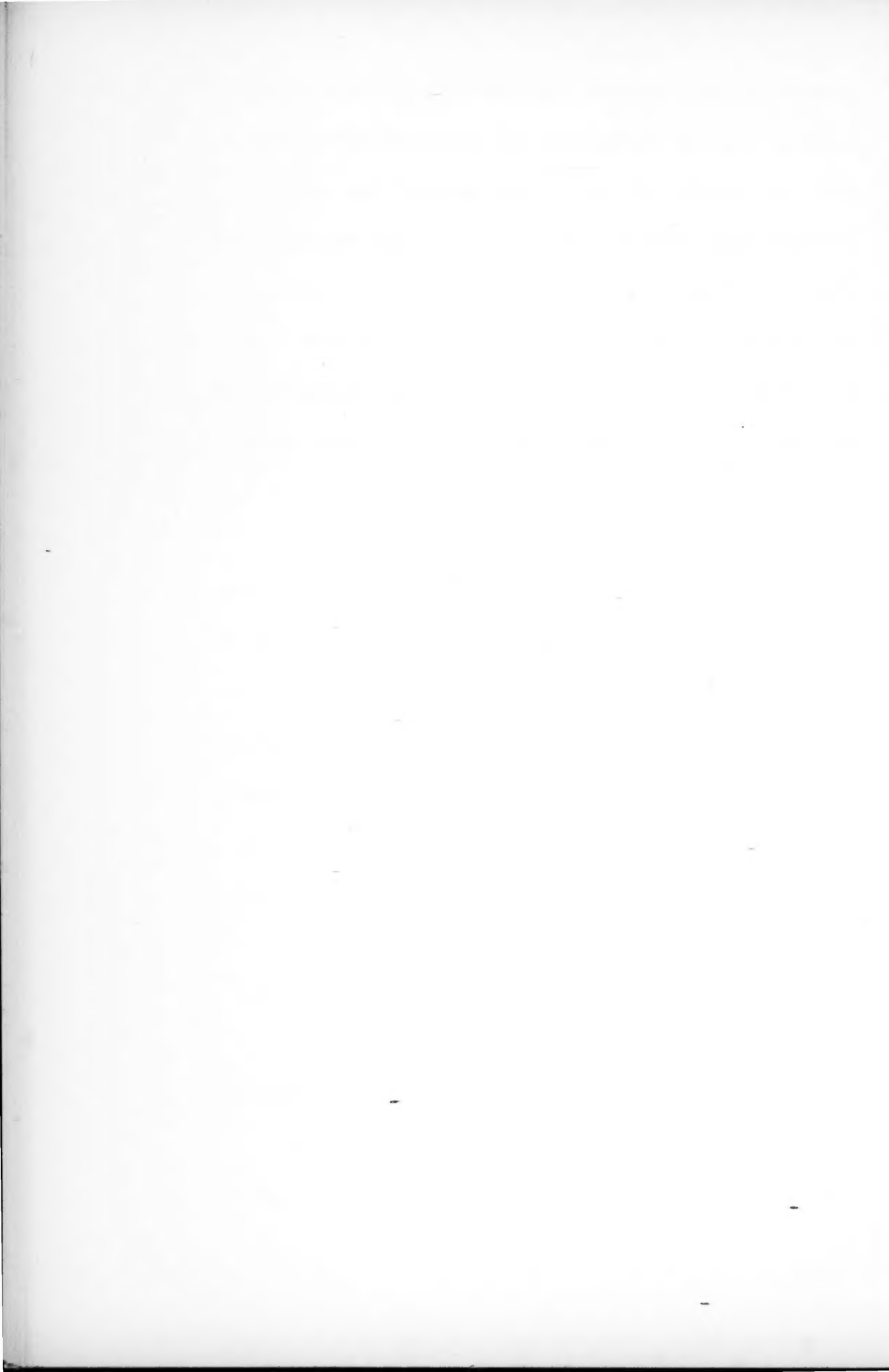
**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Circuit Rule 34-4.

District of Oregon denied his post trial motion for a judgment of acquittal under Fed. R. Crim. P. 20. On appeal he challenges the denial of his Rule 29 motion and the decision of the court to grant the government's post trial motion, under Fed. R. Crim. P. 36, to correct a clerical error in the record. We have jurisdiction under 28 U.S.C § 1291 and affirm.

I. Facts

Burke, the President of Emerald Empire Banking Company ("Emerald"), was charged in an extensive indictment with violations of various federal banking laws. This appeal concerns only the charge that in an August 19, 1983 letter from Burke to the Federal Reserve Bank of San Francisco ("Fed"), in response to a July 7, 1983 Examination Report of Emerald, Burke made three false statements.

In February 1983 Fed examiners undertook an review of Emerald's operations. The July 7 Examination Report criticized



the bank's operations in several respects. Of particular concern was the relationship between Emerald and Oregon developer Gregory Harsch and his firm, Harsch Construction and Development Company ("HCDC"), which the Fed viewed as posing an unacceptable risk to the financial health of the bank.

Emerald loaned more than three hundred thousand dollars to ten persons for the development of residential properties. HCDC was the contractor in each of these projects and funds were paid directly to HCDC by Emerald. The Fed report alleged that these transactions were carried out in violation of two Oregon banking regulations. The loans violated Oregon Rev. Stat. § 708.068 because the entire loan amounts were paid to HCDC prior to construction of the property and not, as the statute requires, "from time to time during the progress of the construction." The report also alleged that Emerald had



violated Oregon Rev. Stat. § 708.305 by lending money to Harsch and persons closely associated with HCDC in excess of statutory limits.

A July 7, 1983, letter from the Fed to Emerald's Board of Directors, accompanying the Report of Examination, asked the Board "to assure that appropriate and necessary steps are being taken to remedy the matters subject to criticisms," and requested the Board's written comments on "the status of, and...plan for improving and/or liquidating, each classified asset of \$10,000 or more...and actions taken to correct the violations of law shown in the report.

In his August 19, 1983 response, Burke addressed the § 708.068 violations that resulted from the bank's association with HCDC. Burke stated

The violations cited have resulted in the Bank changing it's [sic] procedure on the disbursement of the construction loans. It is now obtaining a builder certification and doing a progress inspection on the construction loans. All but two of the loans listed on the violations have closed into permanent



take out loans and the majority of these loans have been sold into the secondary market.

(emphasis supplied) The indictment asserted the response was false in three respects: the bank did not begin "progress inspections"; more than two of the ten HCDC-associated loans had not "closed into permanent take out loans"; and none of the loans were sold into the secondary market.

II. Discussion

A. Admission of Exhibits Under Rule 36

As an initial matter, Burke challenges a post trial order by the district court, pursuant to Fed. R. Crim. P. 36, amending the clerk's record to reflect the admission, nunc pro tunc, of six government exhibits. The court order indicates that "due to omission or oversight" the record failed to list the six exhibits as having been received in evidence. Under Rule 36, "Clerical mistakes in...the record arising from oversight or omission may be corrected by the court...." We review the



decision of the district court to correct the record, pursuant to Rule 36, for clear error. United States v. Bergmann, 836 F.2d 1220, 1221 (9th Cir. 1988).

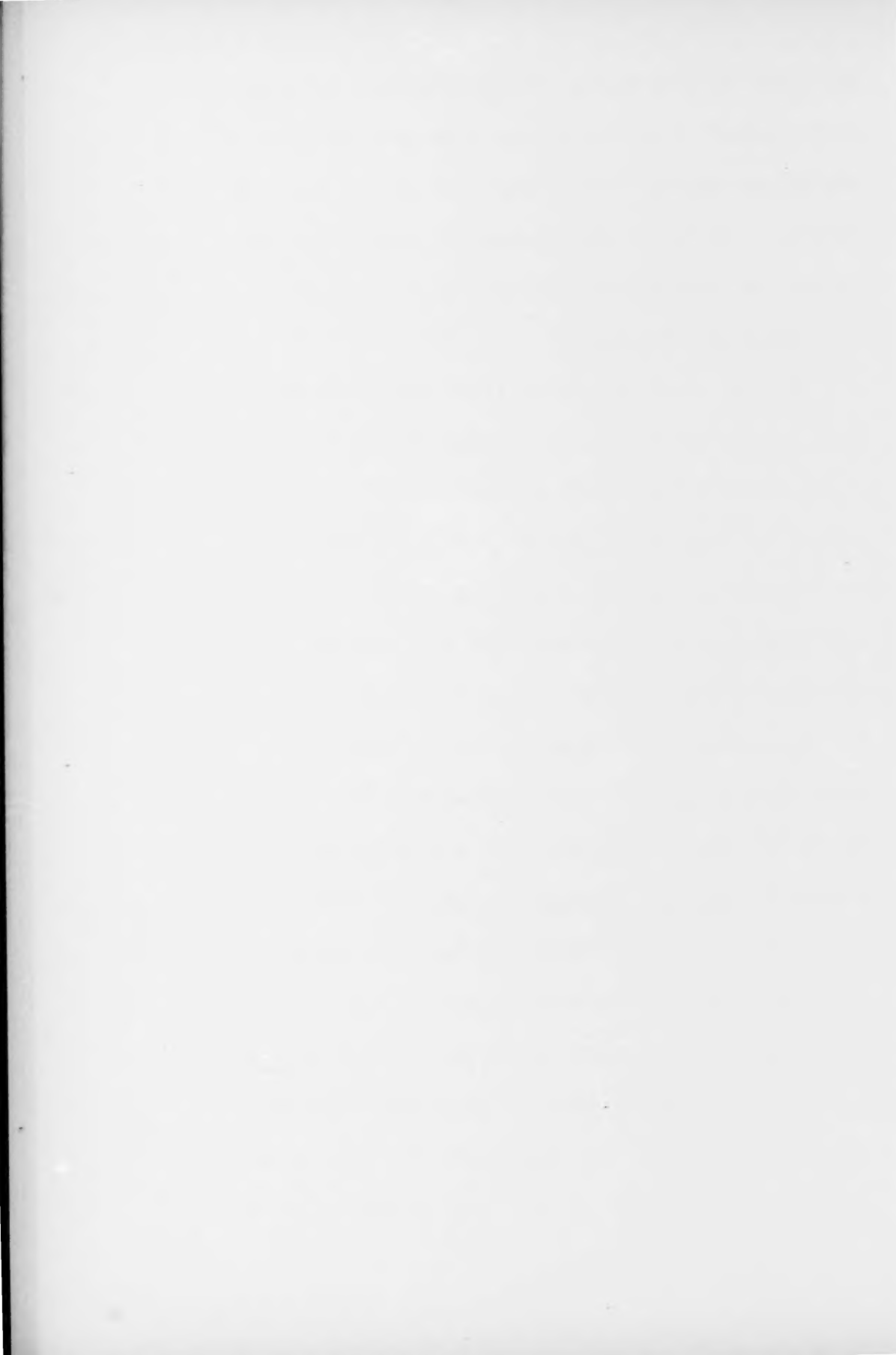
Burke argues the exhibits, including the Report of Examination and Burke's letter to the Fed in response, were never before the jury. As such, the court could not admit them through a Rule 36 clerical correction to the record. This assertion lacks any substance. The government demonstrated to the district court, and has shown here, the parties treated the six exhibits as having been admitted at the time of the argument on Burke's Rule 29 motion. Indeed, in his Rule 29 argument Burke's counsel made several references to the Report and response letter without any indication of objection to their admission. It is not possible the jury arrived at a verdict on the 18 U.S.C. § 1001 count without making reference to the Report and Burke's response. There is no evidence the

failure to indicate the admission of the additional four exhibits was the result of anything other than clerical error by the court. Burke's challenge to the Rule 36 order is therefore rejected.

B. Rule 29 Motion

Burke also appeals from the denial of his post trial motion, under Fed. R. Crim. P 29, for a judgment of acquittal on the count of making a false official statement in violation of 18 U.S.C. § 1001. We will not disturb a jury verdict if, reviewing the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Adler, 879 F.2d 473, 495 9th Cir. 1988) (citation omitted).

To establish a violation of 18 U.S.C. § 1001, the government must establish Burke (a) intentionally made a statement within the jurisdiction of the fed; (b) the statement was material (i.e., had propensity to



influence Fed action); (c) the statement was false; and d) appellant knew the statement was false. 18 U.S.C. § 1001; see also United States v. Oren, 893 F.2d 1057, 1063-65 (9th Cir. 1990); United States v. Facchini, 874 F.2d 638, 641-44 9th Cir. 1989); United States v. Vaughn, 797 F.2d 1485, 1490 (9th Cir. 1986); United States v. Green, 745 F.2d 1205, 1208 (9th Cir. 1984). Burke challenges the sufficiency of the evidence supporting the last two of these requirements.

His argument at trial, and on appeal, is that each of the three asserted false statements was not actually false, and even if literally untrue, that he believed them to be true. We find there was sufficient evidence for a rational jury to find each of the three statements was false and that Burke knew it was false.

1. Falsity

Burke asserts at the time of his letter to the Fed, a loan purchase agreement



between Emerald and Island was complete. We believe a rational jury could have found otherwise. The government demonstrated the terms of the Island offer letter were not sufficiently certain to result in a binding contract.

2. Burke's Belief

The jury also must have found that Burke knew the loans had not been sold. It could have inferred such knowledge from his extensive involvement in the attempt to complete the Island loan sale deal. The "offer" letter from Island to Emerald is addressed to Burke and therefore he could be charged with knowledge of the contingencies (e.g. inspection of the loans, title insurance) that caused the deal to fall through. The government also introduced the testimony of a lawyer who deposed Burke in civil litigation relating to the failure of Emerald. The attorney testified that Burke acknowledged Island had never purchased the loans, and that it had not



done so because "the down payments on the loans were all notes. There was no hard money down on any of the transaction." The jury reasonable could have inferred from Burke's extensive involvement in the attempted deal with Island, and from his deposition statements, that he knew his August 19 statement to the Fed was false.

The judgment below is AFFIRMED.



NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	No. 90-30001
)	
Plaintiff-Appellee,)	D.C. No.
)	CR 88-60002-BU
v.)	
)	ORDER
JERRY L. BURKE,)	
)	
Defendant-Appellant.))	
<hr/>		

BEFORE: PREGERSON, BRUNETTI, AND T.G.
NELSON, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX "B"